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Stephen F. Befort

Elizabeth C. Borer

Repository Citation

Stephen F. Befort and Elizabeth C. Borer, *Equitable Prescription Drug Coverage: Preventing Sex Discrimination in Employer-Provided Health Plans*, 70 La. L. Rev. (2009)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol70/iss1/8>

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Equitable Prescription Drug Coverage: Preventing Sex Discrimination in Employer-Provided Health Plans

Stephen F. Befort*

Elizabeth C. Borer**

INTRODUCTION

Jennifer Erickson spent more than \$300 a year out of pocket on birth control pills because her employer excluded contraceptives from its self-insured health plan.¹ Ms. Erickson, a twenty-six year old pharmacist at the Bartell Drug Company, also frequently had to inform her customers that their insurance would not pay for their contraceptive prescriptions either.² She watched as many women simply gave up their prescriptions because they could not afford the out-of-pocket expense.³ Frustrated by the unequal coverage of prescriptions for men and women,⁴ Ms. Erickson turned to Planned Parenthood of Western Washington for help.⁵ Erickson and Planned Parenthood eventually filed a lawsuit against Bartell, alleging violations of Title VII, as amended by the Pregnancy Discrimination Act (PDA).⁶ In the first court ruling on the issue of gender equity in prescription contraceptive drug coverage, a

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* Gray, Plant, Mooty, Mooty, & Bennett Professor of Law, University of Minnesota Law School.

** J.D. 2009, University of Minnesota Law School; Associate, Best & Flanagan, Minneapolis, Minnesota.

Special thanks to Amy Monahan for her helpful advice on this article.

1. Tamar Lewin, *Company's Insurance Should Pay for Contraceptives, Suit Says*, N.Y. TIMES, July 20, 2000, at A16.

2. *Id.* (quoting Ms. Erickson: "Every single day, I'm processing prescriptions and telling women that their pills aren't covered. Sometimes, they walk away from the counter and say they can't afford it. It really makes you sad, and then you realize your own company doesn't cover it either.").

3. *Id.*

4. Many health insurance plans excluded contraception but covered Viagra and other male-specific prescription drugs. See Christopher G. Kuhn, *An EPICC Oversight: Why the Current Battle for Access to Contraception Will Not Help Reduce Unintended Pregnancy in the U.S.*, 17 HEALTH MATRIX 347, 355 (2007); Lee Korland, Note, *Sex Discrimination or a Hard Pill for Employers to Swallow: Examining the Denial of Contraceptive Benefits in the Wake of Erickson v. Bartell Drug Co.*, 53 CASE W. RES. L. REV. 531, 531-32 (2002).

5. Sarah Schafer, *Judge Orders Firm to Cover Birth Control*, WASH. POST, June 13, 2001, at E01.

6. *Id.*

federal judge in Seattle held that Bartell discriminated against women by excluding prescription contraceptives from its employee health plan.⁷

Six years later, the Eighth Circuit—the only federal court of appeals to consider the application of the PDA to employer exclusions of insurance coverage for contraception—reached the opposite conclusion in *In re Union Pacific Railroad Employment Practices Litigation (Union Pacific)* when it held that the lack of contraception coverage in an employee health insurance plan did not violate the PDA.⁸ Emphasizing the purpose of the PDA, the Planned Parenthood attorney who represented the plaintiffs, Roberta Riley, noted: “It’s shocking that this court says that contraception isn’t related to pregnancy, since if it weren’t for pregnancy, contraception wouldn’t exist. It’s also shocking that the plan covers Rogaine, for men’s baldness, and Viagra, for impotence, but not birth control pills.”⁹

The Eighth Circuit’s *Union Pacific* opinion is not likely the definitive answer to the question of whether the PDA prohibits employers from excluding prescription contraceptives from otherwise comprehensive health plans. Indeed, federal district courts across the country are currently split as to whether the PDA requires coverage of prescription contraceptives.¹⁰ Over two-thirds of women of child-bearing age in the United States depend on private health insurance, primarily provided through employer-sponsored health plans, for their health care, and nearly half of

7. *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1271 (W.D. Wash. 2001) (“Having reviewed the legislative history of Title VII and the PDA, the language of the statute itself, and the relevant case law, the Court finds that Bartell’s exclusion of prescription contraception from its prescription plan is inconsistent with the requirements of federal law.”).

8. *See In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936 (8th Cir. 2007).

9. Tamar Lewin, *Court Says Health Coverage May Bar Birth-Control Pills*, N.Y. TIMES, Mar. 17, 2007, at A1.

10. *Compare* *Stocking v. AT&T Co.*, 436 F. Supp. 2d 1014, 1016–17 (W.D. Mo. 2006) (holding that the PDA requires coverage of contraception), *and* *Mauldin v. Wal-Mart Stores, Inc.*, No. 01-2755, 2002 WL 2022334, at *19 (N.D. Ga. Aug. 23, 2002) (certifying class of female employees alleging that Wal-Mart’s lack of coverage for prescription contraception violated the PDA), *and* *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1270–71 (W.D. Wash. 2001) (holding that the PDA requires coverage of contraception), *with* *Cummins v. Illinois*, No. 02-4201, 2005 U.S. Dist. LEXIS 42634, at *1–2, *28 (S.D. Ill. Aug. 30, 2005) (excluding contraception does not violate the PDA), *and* *Alexander v. Am. Airlines, Inc.*, No. 02-252, 2002 WL 731815, at *3–4 (N.D. Tex. Apr. 22, 2002) (dismissed, holding that the PDA does not require providing contraception).

large group plans do not cover prescription contraceptives.¹¹ Prescription contraceptives create a considerable expense for millions of American women and their families.¹² Women pay an estimated sixty-three to sixty-eight percent more than men in out-of-pocket health care costs,¹³ and the cost of prescription contraceptives represents the largest share of this disparity.¹⁴ Accordingly, working women likely will continue to challenge the exclusion of prescription contraception in courts across the country.¹⁵

Meanwhile, twenty-three states have enacted statutes that mandate the inclusion of prescription contraceptives in group health plans.¹⁶ These state mandates, however, have a limited reach due to the effect of preemption under the Employee Retirement Income Security Act (ERISA),¹⁷ which insulates self-insured plans from state regulation.¹⁸ These statutes, in addition, are far from uniform in terms of their requirements.¹⁹

This Article proposes a two-part strategy for expanding the availability of prescription contraceptives in employer-sponsored health plans. First, employers that exclude prescription contraceptives from employee health insurance plans should be held to violate Title VII, as amended by the PDA. Such a violation occurs because the failure to provide insurance coverage for prescription contraceptives necessarily affects a sex-related medical condition since only women can become pregnant. This Article additionally urges the adoption of an amendment to

11. Kuhn, *supra* note 4, at 352.

12. Sheila Bapat, Comment, *Fighting Collectively for Contraceptive Equity: Class Action Litigation and Emerging Labor Union Support for Contraceptive Coverage*, 9 U. PA. J. LAB. & EMP. L. 951, 952 (2007).

13. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 109 Cal. Rptr. 2d 176, 182 (Cal. Ct. App. 2001) ("Almost 5 million privately-insured women between the ages of 14 and 44 have out-of-pocket health expenditures exceeding 10 percent of their income.").

14. Recent Case, *Eighth Circuit Holds that Benefits Plans Excluding All Contraceptives Do Not Discriminate Based on Sex*, 121 HARV. L. REV. 1447, 1454 (2008) (citing *Catholic Charities of Sacramento, Inc.*, 109 Cal. Rptr. 2d at 182).

15. This paper focuses exclusively on the discriminatory impact of employer health plans and does not address the financial or health consequences for uninsured women. For a discussion of these impacts on uninsured women, see Kuhn, *supra* note 4, at 367–74.

16. See *infra* note 176 and accompanying text.

17. 29 U.S.C. §§ 1001–1461 (2006).

18. See *infra* note 172 and accompanying text.

19. See *infra* notes 182–185 and accompanying text.

ERISA²⁰—the Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC)—which would mandate all group health plans to include prescription coverage as a matter of federal law. Such an enactment would serve to require prescription contraceptive coverage in both insurance-based and self-insured employer health plans.

This Article proceeds in three parts. Part I examines the statutory foundations of Title VII and the PDA. Part II analyzes recent cases considering the legality of contraceptive exclusions from employer-provided health plans and ultimately advocates for judicial adoption of Judge Bye's dissenting opinion from the Eighth Circuit's *Union Pacific* majority holding. Part III considers mandated health benefit legislation and supports the adoption of the proposed federal EPICC legislation, which would require comprehensive employer health plans to cover prescription contraceptives.

I. STATUTORY PROTECTIONS: TITLE VII AND THE PREGNANCY DISCRIMINATION ACT

In 1964, Congress passed Title VII of the Civil Rights Act, prohibiting employment discrimination based on race, color, national origin, religion, and sex.²¹ The inclusion of sex discrimination in the Act was an eleventh-hour addition.²² While legislators debated the bill on the House floor, Howard W. Smith of Virginia, a devoted opponent of civil rights legislation, proposed to add the word "sex" to the bill in order "to prevent discrimination against another minority group, the women."²³ Representative Smith's suggestion stimulated several hours of laughter-filled debate, later enshrined as "Ladies Day in the House," before the amendment passed by a vote of 168 to 133.²⁴

A sweeping remedial response to the problems of employment discrimination in the United States, the Civil Rights Act also

20. The Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001–1461, establishes reporting, disclosure, and fiduciary responsibilities with respect to pension and employee welfare benefit plans.

21. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e–2000e-17); see also Alice A. Reuter, Comment, *Subtle But Pervasive: Discrimination Against Mothers and Pregnant Women in the Workplace*, 33 FORDHAM URB. L.J. 1369, 1374–75 (2006) (summarizing the development of legislative protections for working women).

22. See Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 163 (1991).

23. See 110 CONG. REC. 2577 (1964); Freeman, *supra* note 22, at 163.

24. Freeman, *supra* note 22, at 163.

established the Equal Employment Opportunity Commission (EEOC) as an administrative enforcement body.²⁵ Charged with investigating claims of discrimination made under Title VII,²⁶ the EEOC also has the authority to sue employers allegedly engaged in discriminatory conduct²⁷ and to provide interpretative guidance on Title VII.²⁸ Initially, the EEOC refused to enforce Title VII claims of sex discrimination because the agency considered the inclusion of “sex” in the Act a “fluke.”²⁹ Nevertheless, one-third of the complaints filed with the EEOC during its first year charged sex discrimination,³⁰ and the widespread problem of gender discrimination in the workplace could no longer be ignored. In 2008, more than 28,000 charges of sex-based discrimination were filed with the EEOC.³¹

A. Discrimination Based on Pregnancy, Motherhood, and Childcare

Title VII prohibits an employer from discriminating against any individual with respect to “compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex.”³² Early Title VII cases invalidated state laws prohibiting women from employment in certain jobs.³³ Courts later used Title VII to establish sexual harassment as sex-based discrimination in the workplace.³⁴ Recognizing pregnancy discrimination as a form of sex discrimination proved more challenging for working women.

In a significant step toward remedying discrimination based on pregnancy and motherhood, the United States Supreme Court

25. See 42 U.S.C. § 2000e-4 (2006) (creating the EEOC and establishing its powers).

26. See *id.* § 2000e-6.

27. See *id.* § 2000e-5.

28. See *id.* § 2000e-12.

29. Freeman, *supra* note 22, at 164.

30. 5 EEOC ANN. REP. 30 (1971).

31. See Equal Employment Opportunity Commission, Sex-Based Charges, FY 1997 Through 2008, <http://www.eeoc.gov/stats/sex.html> (last visited Oct. 11, 2009) (reporting the receipt of 28,372 sex-based charges of discrimination during fiscal year 2008).

32. 42 U.S.C. § 2000e-2(a)(1) (2006).

33. See *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 235–36 (5th Cir. 1969) (invalidating laws designed to “protect” women by prohibiting them from working in jobs viewed as dangerous for women); see also Keri Phillips, Note, *Resurrecting Gilbert: Facial Parity as Unequal Treatment in the Eighth Circuit’s In Re Union Pacific Railroad Employment Practices Litigation*, 31 HAMLINE L. REV. 309, 326 (2008).

34. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986) (holding that adverse action against an employee for refusal to engage in a sexual relationship with a supervisor constituted sex-based discrimination).

recognized the viability of "sex-plus" claims.³⁵ Sex-plus claims recognize discrimination against women who are treated disparately, not only because of gender, but also because of an additional characteristic such as weight or marital status.³⁶ In *Phillips v. Martin Marietta Corp.*, the Supreme Court held that treating mothers with pre-school aged children differently than fathers, without proof of a bona fide occupational qualification, constituted sex discrimination in violation of Title VII.³⁷

Despite the recognition of some sex-plus claims, the Court initially held that pregnancy discrimination was not based on sex. In *Geduldig v. Aiello*, six Justices ruled that California's failure to insure the risk of disability from normal pregnancy did not constitute discrimination in violation of the Equal Protection Clause.³⁸ Specifically, the Court noted that even though only women can become pregnant, the exclusion of pregnancy from disability-benefits coverage was not discrimination based on sex.³⁹ The Court reaffirmed the logic of the *Geduldig* holding in *General Elec. Co. v. Gilbert (Gilbert)*.⁴⁰ In *Gilbert*, the Court held that an employer's failure to cover pregnancy-related disabilities under its disability benefits plan did not violate Title VII absent any indication that the exclusion of pregnancy disability benefits was a pretext for discriminating against women.⁴¹ The Supreme Court's decision rejected EEOC guidelines and the unanimous conclusion of all six federal courts of appeals that had addressed the issue⁴² on

35. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

36. Reuter, *supra* note 21, at 1375.

37. *Phillips*, 400 U.S. at 544.

38. 417 U.S. 484, 497 n.20 (1974) ("The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities.").

39. *Id.* at 496–97 n.20 ("While it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . .").

40. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 135 (1976) (stating that "*Geduldig* leaves no doubt that our reason for rejecting appellee's equal protection claim in that case was that the exclusion of pregnancy from coverage under California's disability-benefits plan was not in itself discrimination based on sex.").

41. *Id.* at 136 ("*Geduldig* is precisely on point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all.").

42. *Id.* at 146–47 (Brennan, J., dissenting) (citing *Commc'ns Workers v. Am. Tel. & Tel.*, 513 F.2d 1024 (2d Cir. 1975); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199 (3d Cir. 1975), *vacated on jurisdictional grounds*, 424 U.S. 737 (1976); *Gilbert v. Gen. Elec. Co.*, 519 F.2d 661 (4th Cir. 1975); *Tyler v. Vickery*, 517 F.2d 1089, 1097–99 (5th Cir. 1975); *Satty v. Nashville Gas Co.*,

the grounds that General Electric's policy covered the same illnesses and conditions for both men and women. According to the *Gilbert* majority, an employer need not go beyond this facial parity to provide greater benefits to women simply because "their differing roles in the scheme of human existence" implicate additional health risks.⁴³

Justices Brennan and Marshall dissented in *Gilbert*, noting that "although all mutually contractible risks are covered irrespective of gender" under the health plan at issue, "the plan also insures risks such as prostatectomies, vasectomies, and circumcisions that are specific to the reproductive system of men and for which there exist no female counterparts covered by the plan" and that "pregnancy affords the only disability, sex-specific or otherwise, that is excluded from coverage."⁴⁴ Justice Brennan further opined that it is discriminatory for a company to adopt "a policy that, but for pregnancy, offers protection for all risks, even those that are 'unique to' men or heavily male dominated."⁴⁵ Justice Stevens wrote a separate dissenting opinion emphasizing that "the rule at issue places the risk of absence caused by pregnancy in a class by itself" and that, by definition, "such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male."⁴⁶ The logical underpinnings of the *Gilbert* dissents provided the foundation for subsequent congressional revisions to Title VII through the PDA.⁴⁷

B. Redefining Protection: The Pregnancy Discrimination Act

Congress amended Title VII in 1978 to include the PDA.⁴⁸ Drafted as a legislative restoration of the proper meaning of Title VII after the Supreme Court's *Gilbert* holding, the PDA clarified that the exclusion of pregnancy benefits violated Title VII.⁴⁹ Indeed, a House Report supporting the PDA expressed the view "that the dissenting justices [in *Gilbert*] correctly interpreted the

522 F.2d 850 (6th Cir. 1975); *Hutchinson v. Lake Oswego Sch. Dist. No. 7*, 519 F.2d 961 (9th Cir. 1975)).

43. *Id.* at 134 n.17.

44. *Id.* at 152 (Brennan, J., dissenting).

45. *Id.* at 160.

46. *Id.* at 161-62 (Stevens, J., dissenting).

47. H.R. REP. NO. 95-948 (1978) (Conf. Rep.), as reprinted in 1978 U.S.C.C.A.N. 4749, 4750-51.

48. Pregnancy Discrimination Act, Pub. L. No. 95-555, Oct. 31, 1978, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2006)).

49. H.R. REP. NO. 95-948 (1978).

Act.”⁵⁰ Specifically, the PDA amended Title VII by adding the following language to the definitions section of the statute:

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work⁵¹

The PDA significantly altered judicial treatment of pregnancy-related discrimination cases. In its first decision construing the PDA amendment—*Newport News Shipbuilding and Dry Dock Co. v. EEOC (Newport News)*—the Supreme Court found that an insurance plan that covered pregnancy-related costs for female employees, but not for the spouses of male employees, violated Title VII as amended by the PDA.⁵² In reaching this conclusion, the Court recognized that “Congress, by enacting the Pregnancy Discrimination Act, not only overturned the specific holding” in *Gilbert* that the exclusion of disabilities caused by pregnancy from an employer’s disability plan did not constitute discrimination based on sex, but also “rejected the test of discrimination employed by the Court” that differential treatment of pregnancy is not gender-based discrimination because only women can become pregnant.⁵³ Recognizing the broad remedial purpose of the PDA, the Court noted: “The 1978 Act makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions.”⁵⁴ Accordingly, the *Newport News*

50. *Id.* at 2.

51. 42 U.S.C. § 2000e(k) (2006). The PDA does not require an employer to pay for health insurance benefits for abortion; however, the PDA provides exceptions where the life of the mother would be endangered if the fetus were carried to term or where medical complications have arisen from an abortion. *See id.* The statute also does not preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion. *Id.*

52. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676 (1983).

53. *See id.* at 676, 684 (“Although *Gilbert* concluded that an otherwise inclusive plan that singled out pregnancy-related benefits for exclusion was nondiscriminatory on its face, because only women can become pregnant, Congress has unequivocally rejected that reasoning.”).

54. *Id.* at 684 (holding that an employer health plan providing female employees with hospitalization benefits for pregnancy-related conditions but offering less extensive pregnancy benefits for spouses of male employees discriminated against male employees and violated the PDA).

Court made clear that discrimination based on pregnancy is, on its face, discrimination because of sex.⁵⁵

In its second decision construing the 1978 amendment, the Court explained that the PDA does not limit protection only to women who are already pregnant.⁵⁶ In *International Union, UAW v. Johnson Controls, Inc. (Johnson Controls)*, a 1991 decision, the Court held that the PDA forbids sex-specific fetal protection policies that prohibit women from performing certain jobs.⁵⁷ Female employees challenged Johnson Controls' policy that barred all women, except those whose infertility was medically documented, from jobs involving actual or potential lead exposure out of concern for the health of any potential fetus.⁵⁸ The Court held that Johnson Controls' fetal protection policy "explicitly discriminates against women on the basis of their sex" because the policy "excludes women with childbearing capacity from lead-exposed jobs and so creates a facial classification based on gender."⁵⁹ The Court explained that the PDA "bolster[s]" this conclusion by making classifications based upon pregnancy explicit sex discrimination for purposes of Title VII.⁶⁰ Accordingly, the Court concluded that a policy that classifies employees by their "potential for pregnancy" must be regarded as explicit sex discrimination.⁶¹

II. EMPLOYER HEALTH PLAN CONTRACEPTION EXCLUSIONS AND TITLE VII

In spite of this Supreme Court precedent, courts currently disagree about whether excluding prescription contraceptives from an otherwise inclusive employer-provided health plan violates Title VII, as amended by the PDA. Employers generally are free to determine what health insurance benefits, if any, they offer to

55. *Id.* ("The Pregnancy Discrimination Act has now made clear that, for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex.").

56. See Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 378 (1998).

57. See *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 187 (1991); see generally Stephen F. Befort, *BFOQ Revisited: Johnson Controls Halts the Expansion of the Defense to Intentional Sex Discrimination*, 52 OHIO ST. L.J. 5 (1991).

58. *Johnson Controls*, 499 U.S. at 192.

59. *Id.* at 197 (noting that "[f]ertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job.").

60. *Id.* at 198.

61. *Id.* at 199 ("Under the PDA, such a classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination.").

employees.⁶² Nevertheless, once an employer establishes an employer-sponsored health plan, Title VII forbids discrimination in the provision of such benefits on the basis of gender.⁶³ Thus, courts must evaluate whether employer health plans that provide comprehensive medical care (including coverage for preventive prescription drugs used only by males), but fail to cover prescription contraceptives used by women, constitute such discrimination.⁶⁴ To explore the legality of contraceptive omissions in employer-provided health plans, Subpart A examines the court's reasoning in *Erickson v. Bartell Drug Co.*, the earliest federal case to consider the issue of contraceptive exclusion under the PDA. Next, Subpart B reviews the contrary holding of the Eighth Circuit's recent opinion in *Union Pacific*. Finally, Subparts C and D analyze the issues raised in these two decisions and conclude by encouraging other courts to adopt the reasoning offered by Judge Bye in his *Union Pacific* dissent.

A. Recognizing Congressional Purpose: Erickson v. Bartell Drug Co.

As discussed above, Jennifer Erickson sued her employer, Bartell Drug Company, arguing that the selective exclusion of prescription contraceptives from an otherwise comprehensive prescription plan constituted discrimination on the basis of sex.⁶⁵ Washington state law mandates that employers cover prescription contraceptives.⁶⁶ But Erickson could not sue under state law because ERISA preempts state regulation of self-insured employer plans, like that sponsored by Bartell.⁶⁷ ERISA does not, however, preempt federal antidiscrimination laws,⁶⁸ and thus Erickson sought recovery under Title VII, as amended by the PDA.⁶⁹

62. See 29 U.S.C. §§ 1181–1191 (2006).

63. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983).

64. Cf. *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 945 (8th Cir. 2007) (Bye, J., dissenting).

65. See *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1268 (W.D. Wash. 2001).

66. WASH. ADMIN. CODE § 284-43-822(2)(a) (2009) (“Health plans providing generally comprehensive coverage of prescription drugs and/or prescription devices shall not exclude prescription contraceptives or cover prescription contraceptives on a less favorable basis than other covered prescription drugs and prescription devices.”).

67. See 29 U.S.C. § 1144(a) (2006); e.g., *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 727 (1985).

68. See 29 U.S.C. § 1144(d) (2006).

69. *Erickson*, 141 F. Supp. 2d at 1268.

In 2001, Judge Lasnik of the Western District of Washington held that because the Bartell Drug Company's self-insured employer health plan generally covered most prescription drugs and preventive medications but specifically excluded prescription contraceptives used by women for birth control purposes, it discriminated on the basis of sex in violation of Title VII.⁷⁰ Faced with an issue of first impression for the federal courts, Judge Lasnik examined the legislative history of Title VII, stating that "the goal of Title VII was to end years of discrimination in employment and to place all men and women . . . on equal footing in how they were treated in the workforce."⁷¹ Next, the court analyzed the legislative purpose of the PDA, noting that the intent of the amendments was to overturn the Supreme Court's holding in *Gilbert*.⁷² Specifically, the *Erickson* court held that in enacting the PDA, "Congress embraced the [*Gilbert*] dissent's broader interpretation of Title VII which not only recognized that there are sex-based differences between men and women employees, but also required employers to provide women-only benefits or otherwise incur additional expenses on behalf of women in order to treat the sexes the same."⁷³ Rooted in the "legal principles established by *Gilbert* and its legislative reversal," the *Erickson* court held that discrimination based on any sex-based characteristic is sex discrimination, and thus the employer's exclusion of prescription contraceptives violated Title VII.⁷⁴

Significantly, the *Erickson* court relied on the *Gilbert* dissents, the post-PDA Supreme Court decisions in *Newport News* and *Johnson Controls*, and the legislative objectives of Title VII in crafting its decision.⁷⁵ *Erickson* also referenced an EEOC policy decision that held the PDA's prohibition of discrimination based on "pregnancy, childbirth, or related medical conditions" includes pregnancy prevention methods and applies to fringe benefit plans.⁷⁶ Relying on these purposive sources, the *Erickson* court held that the PDA requires employers to provide equally comprehensive health care coverage, even if that means providing

70. See *id.* at 1276–77 (noting that "Bartell's prescription drug plan discriminates against Bartell's female employees by providing less complete coverage than that offered to male employees").

71. *Id.* at 1269.

72. *Id.* at 1270.

73. *Id.*

74. *Id.*

75. *Id.* at 1277.

76. *Id.* at 1275–76 (noting that the "enforcing agency's overall interpretation of Title VII comports with this Court's construction of the Act and led the Commission to the same conclusion reached by this Court").

additional benefits to cover women-only expenses.⁷⁷ Following the *Erickson* decision, other federal courts agreed that the failure to insure prescription contraceptives discriminates on the basis of sex under Title VII.⁷⁸ Until the Eighth Circuit addressed the issue, only two unpublished federal district court opinions had rejected the *Erickson* court's logic.⁷⁹

B. Parsing Statutory Text: The Eighth Circuit's Union Pacific Decision

The Union Pacific Railroad Company, a freight company headquartered in Omaha, Nebraska, sponsored a collectively-bargained health insurance plan that only covered contraceptives when medically necessary for non-contraception purposes.⁸⁰ Brandi Standridge and Kenya Phillips, two of approximately 1,500 female employees of childbearing age employed by Union Pacific, used prescription contraceptives for contraception purposes and were forced to pay out of pocket for the costs of their birth control pills.⁸¹ Named as representatives in a class action against Union Pacific, Standridge and Phillips alleged that Union Pacific's failure to provide prescription contraceptives—which exist only for female as opposed to male use—violated Title VII, as amended by the PDA.⁸² Specifically, the plaintiffs argued that their employer's health plans violated Title VII because, although Union Pacific covered no contraceptives to prevent the medical effects of pregnancy, the plans paid for a variety of other prescription drugs and preventive medical treatments—such as blood pressure

77. *Id.* at 1277.

78. *See* *Stocking v. AT&T Co.*, 436 F. Supp. 2d 1014, 1016–17 (W.D. Mo. 2006) (holding that the PDA requires coverage of contraception); *In re Union Pac. R.R.*, 378 F. Supp. 2d 1139 (D. Neb. 2005) (holding that an employee health plan that excluded contraception violated the PDA); *Cooley v. Daimler Chrysler Corp.*, 281 F. Supp. 2d 979 (E.D. Mo. 2003) (supporting the EEOC opinion that failure to cover contraceptives raises both disparate treatment and disparate impact claims). *See also* Bapat, *supra* note 12, at 956.

79. *See* *Cummins v. Illinois*, No. 02-4201, 2005 U.S. Dist. LEXIS 42634, (S.D. Ill. Aug. 30, 2005) (holding that excluding contraception does not violate the PDA); *Alexander v. Am. Airlines, Inc.*, No. 02-252, 2002 WL 731815, at *4 (N.D. Tex. Apr. 22, 2002) (holding that PDA does not require providing contraception). *See also* Bapat, *supra* note 12, at 956.

80. *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 938 (8th Cir. 2007) (noting that the plan may cover contraceptives when used for treating skin problems or avoiding serious health risks associated with pregnancy).

81. *Id.*

82. *Id.*

medication to prevent heart disease.⁸³ The Union Pacific plans also covered drugs used exclusively by males to treat erectile dysfunction and benign prostatic hypertrophy.⁸⁴

1. The District Court Held That Union Pacific Violated Title VII

The Nebraska federal district court compared the extent to which the Union Pacific plan covered these sex-specific preventive health treatments and granted the plaintiffs' motion for summary judgment.⁸⁵ As discussed by the district court, the PDA forbids discrimination not only on the basis of pregnancy but also on the basis of "related medical conditions" and against "women affected by pregnancy, childbirth, or related medical conditions."⁸⁶ Relying on *Johnson Controls*,⁸⁷ the district court noted that the PDA protects non-pregnant women as well as pregnant women and held that classifications based on childbearing capacity constitute sex discrimination.⁸⁸

Importantly, the district court recognized the medical distinctiveness of contraception when it found that health plans that "deny coverage for *fertility* treatments or for *sterilization* may apply equally to men and women, and not violate Title VII," but health plans that "deny coverage for *contraception*, by definition, affect only the health of *women*."⁸⁹ The district court emphasized that only women experience the medical effects of pregnancy⁹⁰ and concluded that Union Pacific's policy of excluding prescription contraceptives violated Title VII, because it treated the medical care women need to prevent pregnancy "less favorably than it treat[ed] medical care needed to prevent other medical conditions that are no greater threat to employees' health than is pregnancy."⁹¹ The Eighth Circuit rejected this logic.

83. *In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139, 1141 (D. Neb. 2005).

84. *Id.*

85. *Id.* at 1140.

86. 42 U.S.C. § 2000e(k) (2006); *In re Union Pac. R.R.*, 378 F. Supp. 2d at 1143.

87. *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 187 (1991).

88. *In re Union Pac. R.R.*, 378 F. Supp. 2d at 1143.

89. *Id.* at 1145.

90. *Id.* at 1147–48 (describing, in detail, the medical impact of pregnancy by offering a "sex-neutral hypothetical in an attempt to bridge the gender gap-in-attitude toward the prevention and treatment of illness").

91. *Id.* at 1149.

2. *The Eighth Circuit Overrules on the Basis That Contraception Is "Gender-Neutral"*

In reversing and remanding, Judge Gruender, joined by Judge Bowman, held that contraception was not "related to" pregnancy for PDA purposes because it was used before pregnancy, and therefore the PDA did not even apply.⁹² The court relied on *Krauel v. Iowa Methodist Medical Center*,⁹³ an earlier Eighth Circuit opinion that held the PDA does not extend to fertility treatments.⁹⁴ The court in *Krauel* concluded that the PDA's coverage of "related medical conditions" extends only to medical "conditions" associated with "'pregnancy' and 'childbirth.'"⁹⁵ Holding that contraception similarly is not "related to" pregnancy for PDA purposes, the *Union Pacific* majority noted that, like infertility treatments, "contraception is a treatment that is only indicated prior to pregnancy."⁹⁶ According to the court, because contraception is used to prevent pregnancy, it is not "related to" pregnancy and does not come within the PDA's zone of coverage.⁹⁷ The majority opinion found further support for this interpretation from the fact that the plain language of the statute does not mention "contraception" and likely signals that Congress did not intend for the PDA to apply in this context.⁹⁸

The Eighth Circuit distinguished *Johnson Controls*, noting that *Johnson Controls* does not expand the PDA to cover fertility matters before conception,⁹⁹ even though the Supreme Court held in that case that the employer violated Title VII when it excluded women with childbearing capacity from certain jobs.¹⁰⁰ Bound by the *Johnson Controls* precedent, the *Union Pacific* majority made a nuanced distinction that "contraception" is not a gender-specific term like "potential pregnancy," because contraceptive devices may be used by both men and women.¹⁰¹

Turning to the non-PDA Title VII issue, the *Union Pacific* majority rejected the district court's "medical effects" basis for

92. *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 942 (8th Cir. 2007).

93. 95 F.3d 674, 679 (8th Cir. 1996).

94. *In re Union Pac. R.R.*, 479 F.3d at 941.

95. *Krauel*, 95 F.3d at 679.

96. *In re Union Pac. R.R.*, 479 F.3d at 942 (emphasis added).

97. *Id.*

98. *Id.*

99. *Id.* at 941.

100. *See Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

101. *In re Union Pac. R.R.*, 479 F.3d at 942.

comparison.¹⁰² Rather than comparing Union Pacific's coverage of contraceptives to its coverage of preventive treatments for less risky medical conditions,¹⁰³ the Eighth Circuit instead identified the relevant comparison as that concerning the plan's coverage for contraception.¹⁰⁴ Finding that since Union Pacific's plan did not cover any contraceptive methods for women *or* men, the coverage for women was not less favorable and thus did not violate Title VII.¹⁰⁵ In other words, since the plans did not cover birth control pills for women or condoms for men, the coverage was equally exclusive.

3. Judge Bye's Union Pacific Dissent

Judge Bye authored a dissenting opinion that disagreed with the majority's reasoning on each issue. First, Judge Bye contended that Congress intended the PDA to cover pre-pregnancy discrimination, including discrimination in the coverage of prescription contraceptives.¹⁰⁶ Title VII, as amended by the PDA, prohibits discrimination "because of or on the basis of pregnancy, childbirth, *or related medical conditions*."¹⁰⁷ Judge Bye noted that the phrase "related medical conditions" indicates that the PDA covers more than pregnancy alone.¹⁰⁸ He also pointed out that when the PDA was being considered by Congress, Representative Ronald Sarasin explained that the PDA protects a woman's right "to be financially and legally protected before, during, and after her pregnancy."¹⁰⁹

Judge Bye also disagreed that the *Krauel* decision, which held that infertility treatment is not a medical condition related to pregnancy or childbirth,¹¹⁰ necessarily limits the PDA to post-conception conditions. Instead, he cited Supreme Court precedent finding that "potential pregnancy" is a sex-related medical

102. *Id.* at 944.

103. See *In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139, 1147-49 (D. Neb. 2005) (comparing health risks).

104. *In re Union Pac. R.R.*, 479 F.3d at 944. See also Recent Case, *supra* note 14, at 1449.

105. *In re Union Pac. R.R.*, 479 F.3d at 944-45.

106. *Id.* at 946 (Bye, J., dissenting).

107. 42 U.S.C. § 2000e(k) (2006) (emphasis added).

108. *In re Union Pac. R.R.*, 479 F.3d at 946 (Bye, J., dissenting).

109. *Id.* (citing 124 CONG. REC. 38574 (daily ed. Oct. 14, 1978) (statement of Rep. Sarasin, a manager of the House version of the PDA)).

110. See *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679-80 (8th Cir. 1996).

condition.¹¹¹ In *Johnson Controls*, the Supreme Court held that classifying employees on the basis of childbearing capacity, whether or not they were already pregnant, “must be regarded, for Title VII purposes, in the same light as explicit sex discrimination.”¹¹² In addition, Judge Bye distinguished *Krauel* by maintaining that “prescription contraception and infertility treatments are like apples and oranges.”¹¹³ In Judge Bye’s view, although infertility treatment may be gender-neutral because it affects both men and women, contraception treatment is necessarily sex-specific because it prevents pregnancy only in women.¹¹⁴

As to the second issue, Judge Bye agreed with the district court that the proper comparison is not in the plan’s narrow treatment of prescription contraceptives but in the plan’s broader preventable health coverage provided to each gender.¹¹⁵ In making this comparison, Judge Bye particularly focused on the overall medical effect of plan coverage, stating:

When one looks at the medical effect of Union Pacific’s failure to provide insurance coverage for prescription contraception, the inequality of coverage is clear. This failure only medically affects females, as they bear all of the health consequences of unplanned pregnancies. An insurance policy providing comprehensive coverage for preventative medical care, including coverage for preventative prescription drugs used exclusively by males, but fails to cover prescription contraception used exclusively by females, can hardly be called equal. It just isn’t so.¹¹⁶

Summoning the rationale of the *Gilbert* dissenters, Judge Bye concluded that “to be equal, a plan would have to cover for the uniquely female risk of pregnancy, although this required giving women additional benefits men would not receive.”¹¹⁷

111. *In re Union Pac. R.R.*, 479 F.3d 936, 947 (8th Cir. 2007) (Bye, J., dissenting). Notably, the *Krauel* court also recognized that potential pregnancy is a medical condition that is sex-related because only women can become pregnant. See *Krauel*, 95 F.3d at 680.

112. See *Int’l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991).

113. *In re Union Pac. R.R.*, 479 F.3d at 948 (Bye, J., dissenting).

114. *Id.* (“Once pregnant, only the woman’s health is affected. Infertility, by contrast, is a word used to describe a number of medical conditions affecting both men and women.”).

115. *Id.* at 948–49.

116. *Id.* at 945 (citation omitted).

117. *Id.* at 949 (Bye, J., dissenting). Judge Bye also notes it is unsurprising that Union Pacific’s plan does not cover non-prescription male contraceptives

C. Analysis

As the *Erickson* and *Union Pacific* decisions illustrate, the exclusion of prescription contraceptives from an employer-sponsored health insurance plan that generally covers preventative prescription drugs implicates two principal legal issues. The first issue concerns whether contraception is a pregnancy-related condition for purposes of the PDA. If that question is answered in the affirmative, then any plan distinctions based on contraception are *per se* distinctions based on sex.¹¹⁸ The second question asks whether such a plan impermissibly treats males and females on an unequal basis. While the appropriate resolution of these two questions is a close call, Judge Bye's dissenting opinion provides a desirable road map for evaluating gender equity in prescription drug coverage.

1. Applicability of the PDA to Contraception

The Eighth Circuit in *Union Pacific* held that contraception is not "related to" pregnancy for PDA purposes because "contraception is a treatment that is only indicated *prior* to pregnancy."¹¹⁹ In effect, the *Union Pacific* majority endorsed its earlier ruling in *Krauel*, which concluded that the PDA's coverage of "related medical conditions" extends only to medical "conditions" associated with "'pregnancy' and 'childbirth.'"¹²⁰

The Eighth Circuit's ruling on this issue is misguided for several reasons. First, this ruling does not fit easily with the plain text of the PDA. Congress amended Title VII through the PDA to prohibit discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."¹²¹ The first clause of the PDA specifically states that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions."¹²² The broad phrase, "include, but are not limited to,"

because few health insurance policies cover devices available over the counter in drug stores and gas stations across the country. *Id.*

118. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983); H.R. REP. NO. 95-948, at 2 (1978).

119. *In re Union Pac. R.R.*, 479 F.3d at 942 (emphasis added).

120. *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679 (1996).

121. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2006) (emphasis added).

122. *Id.* (emphasis added); see *In re Union Pac. R.R.*, 479 F.3d at 946 (Bye, J., dissenting) (citing Brief for Certain Members of the Congress as Amici

indicates that Congress was not creating an exclusive list but rather was illustrating examples of covered conditions.¹²³ The second clause of the PDA similarly extends coverage to “women *affected by* pregnancy, childbirth, or related medical conditions.”¹²⁴ Congress, in using the terms “related to” and “affected by,” clearly intended coverage of conditions beyond those limited solely to pregnancy and childbirth.

In addition, contraception is “related” to pregnancy in the ordinary sense in which those terms are understood.¹²⁵ The term “relation” is defined as “a logical or natural association between two or more things.”¹²⁶ The specific purpose of contraception is to prevent unwanted pregnancies.¹²⁷ In fact, without contraception, the average woman is likely to become pregnant twelve to fifteen times over the course of her life.¹²⁸ Contraception, therefore, is logically associated with or “related” to the risk of pregnancy—a sex-specific health condition.

A broad reading of the PDA’s plain text also is supported by the PDA’s legislative history. In his dissenting opinion, Judge Bye correctly recognized that the legislative purpose of the PDA requires a comparison of a health care plan’s sex-specific benefits, including pre-pregnancy benefits.¹²⁹ When the PDA was being considered by Congress, Representative Ronald Sarasin explained that the PDA is intended to protect a woman’s right “to be financially and legally protected *before*, during, and after her pregnancy.”¹³⁰ A House Committee Report similarly stated, “[i]n using the broad phrase ‘women affected by pregnancy, childbirth

Curiae Supporting Appellee, *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936 (8th Cir. 2007) (No. 06-1706)).

123. *In re Union Pac. R.R.*, 479 F.3d at 946 (Bye, J., dissenting) (“[T]he term ‘including’ is not one of all-embracing definition, but connotes simply an illustrative application of the general principle.” (citing *Fed. Land Bank of St. Paul v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941))).

124. 42 U.S.C. § 2000e(k) (2006) (emphasis added); see also *In re Union Pac. R.R. Employment Practices Litig.*, 378 F. Supp. 2d 1139, 1143 (D. Neb. 2005) (relying on the second clause to hold that the PDA requires Union Pacific to treat the risk of pregnancy no less favorably than other similar health risks).

125. THE AMERICAN HERITAGE COLLEGE DICTIONARY 1152 (3d ed. 1993) (“related” is defined as “1. Connected; associated. 2. Connected by kinship, marriage, or common origin. 3. Having a specified harmonic connection”).

126. *Id.*

127. *In re Union Pac. R.R.*, 479 F.3d at 938.

128. *In re Union Pac. R.R.*, 378 F. Supp. 2d at 1146.

129. See *In re Union Pac. R.R.*, 479 F.3d at 945–46 (Bye, J., dissenting).

130. *Id.* at 946 (emphasis added) (citing 124 CONG. REC. 38574 (daily ed. Oct. 14, 1978) (statement of Rep. Sarasin, a manager of the House version of the PDA))).

and related medical conditions,' the bill makes clear that its protection extends to the whole range of matters concerning the childbearing process."¹³¹

Most significantly, the Eighth Circuit's logic troublingly abandoned the Supreme Court's holding in *Johnson Controls*,¹³² which applied PDA protection to pre-pregnancy discrimination. In that decision, the Court expressly stated that adverse treatment based on a female worker's "potential pregnancy" is a sex-related medical condition covered by the PDA.¹³³ The Eighth Circuit's ruling that the PDA applies only in a post-conception context is simply inconsistent with *Johnson Controls*' more expansive "potential pregnancy" application.

A 2008 decision of the Seventh Circuit made this point with considerable emphasis. In *Hall v. Nalco Co.*, an employee claimed that her employer violated the PDA by discharging her due to absences resulting from time spent undergoing in vitro fertilization treatment.¹³⁴ The employer argued that the PDA was inapposite because the PDA does not apply to pre-conception matters such as infertility.¹³⁵ The Seventh Circuit, however, explained that the Court in *Johnson Controls* invalidated classifications based on gender and "childbearing capacity."¹³⁶ More particularly, the Seventh Circuit held that "*Johnson Controls specifically forecloses* the argument that the PDA applies only post conception."¹³⁷ The *Hall* court went on to cite numerous circuit court decisions applying the PDA in pre-conception settings.¹³⁸

Finally, even if the Eighth Circuit's reliance on its earlier *Krauel* decision can somehow be squared with the seemingly broader temporal reach of *Johnson Controls*, it is not clear that *Krauel*'s treatment of fertility should be extended to the realm of contraception. As Judge Bye cogently explained, while infertility treatment may be deemed gender-neutral because it can affect both men and women, contraception treatment is necessarily sex-specific because it prevents pregnancy only in women.¹³⁹

131. H.R. REP. NO. 95-948, at 5 (1978).

132. See *Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).

133. *Id.* at 198.

134. *Hall v. Nalco Co.*, 534 F.3d 644, 645 (7th Cir. 2008).

135. *Id.* at 648 n.1.

136. *Id.* at 648 (citing *Johnson Controls*, 499 U.S. at 198).

137. *Id.* at 648 n.1 (emphasis added).

138. See *Griffin v. Sisters of St. Francis*, 489 F.3d 838, 844 (7th Cir. 2007); *Kocak v. Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 470 (6th Cir. 2005); *Walsh v. Nat'l Computer Sys., Inc.*, 332 F.3d 1150, 1160 (8th Cir. 2003).

139. *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 948 (Bye, J., dissenting).

Thus, the plain language of the PDA, its legislative history, and Supreme Court precedent all suggest that the PDA should be read to encompass conception as a pregnancy-related condition. As such, the Supreme Court's *Newport News* decision instructs that discrimination based on contraception is, on its face, discrimination because of sex.¹⁴⁰

2. The Title VII Disparate Treatment Comparison

The Eighth Circuit determined that the appropriate comparison for Title VII purposes is to gauge the respective access of men and women to the specific benefit in question.¹⁴¹ Accordingly, the court found no disparate treatment in Union Pacific's health plan because the plan provided the same lack of coverage for contraception purposes to employees of both genders.¹⁴²

Here again, Judge Bye's dissent more appropriately conforms to Title VII doctrine by considering the broader medical effect of Union Pacific's failure to cover prescription contraceptives as the proper framework for examining the discrimination inquiry.¹⁴³ This approach finds support in the roots of PDA legislative history, existing Supreme Court precedent, and the practical impact of the PDA.

Although both men and women could use different forms of contraceptives to prevent pregnancy, prescription contraceptives are available only to women, and only women experience the medical impact of pregnancy.¹⁴⁴ The Eighth Circuit abandoned the legislative intent underlying the PDA—to prohibit covering male employees' sex-specific health needs more extensively than the sex-specific health needs of women—when it held that Union Pacific's plan did not violate Title VII even though the plan covered male-specific treatments but excluded prescription contraceptives for women.¹⁴⁵

The facial parity logic adopted by the *Union Pacific* majority effectively resurrects the discredited analysis employed in *Gilbert*. In both cases, the errant majorities ruled that a plan's failure to cover pregnancy-related health care risks treats both genders

140. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983); H.R. REP. NO. 95-948, at 2 (1978).

141. See *supra* notes 103-104 and accompanying text.

142. See *supra* note 105 and accompanying text.

143. See *In re Union Pac. R.R.*, 479 F.3d at 945 (Bye, J., dissenting).

144. See Phillips, *supra* note 33, at 345-46.

145. See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 159 (1976) (Brennan, J., dissenting).

equally, despite that such risks are borne only by women.¹⁴⁶ What may appear to be facial parity on the surface, in effect, fails to treat sex-specific risks, as well as overall health risks, equally in practice.

Congress repudiated the facial parity analysis of *Gilbert* through the adoption of the PDA. As the pertinent legislative history demonstrates, Congress affirmatively adopted the *Gilbert* dissenters' views in terms of the appropriate health risk comparison.¹⁴⁷ A House Report on the PDA expressly stated that "[i]t is the committee's view that the dissenting justices correctly interpreted the Act."¹⁴⁸ In a similar fashion, a Senate Report quoted the *Gilbert* dissents and stated that they "correctly express both the principle and meaning of Title VII."¹⁴⁹

The Supreme Court's decision in *Newport News* also endorsed the perspectives of the *Gilbert* dissenters. In that decision, the Court explained that Congress, in enacting the PDA, both rejected the *Gilbert* result and endorsed the reasoning and interpretation of the dissenting opinions.¹⁵⁰

Thus, Congress specifically adopted the reasoning of the *Gilbert* dissenters that courts must compare the health benefits generally made available to male and female employees, including those benefits that relate to sex-specific health needs.¹⁵¹ As Justice Brennan's dissent in *Gilbert* opined, General Electric's plan was discriminatory because it "devised a policy that, but for pregnancy, offer[ed] protection for all risks, even those that are 'unique to' men or heavily male dominated."¹⁵² To Justice Brennan, a plan that covers the sex-specific health needs of male employees more generously than the corresponding sex-specific health needs of female employees runs afoul of Title VII.¹⁵³ Accordingly, the views of the *Gilbert* dissenters require a broad-based comparison of total health needs rather than a formal parity that narrowly focuses on the denial of coverage for just one particular sex-specific health need.¹⁵⁴

146. See Phillips, *supra* note 33, at 342.

147. See *id.* at 332-33; Recent Case, *supra* note 14, at 1451.

148. H.R. REP. NO. 95-948, at 2 (1978), as reprinted in 1978 U.S.C.C.A.N. 4749, 4750.

149. S. REP. NO. 95-331, at 2-3 (1977).

150. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 676-77 (1983).

151. See H.R. REP. NO. 95-948, at 2; Recent Case, *supra* note 14, at 1450-53.

152. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 160 (1976) (Brennan, J., dissenting).

153. See *id.*

154. See Recent Case, *supra* note 14, at 1450-51.

Judge Bye's dissenting opinion in *Union Pacific* is faithful to the view of the *Gilbert* dissenters. His solution, similar to Justice Brennan's, is to compare the overall medical effect of the employer's plan on both men and women.¹⁵⁵ This approach appropriately compares plan coverage of all sex-specific treatments rather than focusing exclusively on coverage for one particular need, i.e., contraception.¹⁵⁶ In *Union Pacific*, the health plan provided comprehensive coverage for preventative medical care, including prescription drugs that benefit the sex-specific needs of males.¹⁵⁷ But the *Union Pacific* plan excluded coverage for prescription contraceptives, even though such contraceptives are available only for women, and only women can become pregnant.¹⁵⁸ Such a plan does not provide equal medical benefits and should not pass muster under Title VII.

3. Additional Policy Considerations

Title VII is a remedial civil rights statute that should be liberally construed.¹⁵⁹ Accordingly, a construction affording female employees broad access to prescription contraceptives should be favored.

More specifically, a key policy objective of Title VII is to eliminate barriers that inhibit equal opportunities for women and minorities in the workplace.¹⁶⁰ The Eighth Circuit's *Union Pacific* decision is inconsistent with this goal. Women confronted with less generous health care coverage will experience diminished employment options.¹⁶¹ As Representative Hawkins noted in arguing in favor of the PDA, discrimination on the basis of pregnancy "is one of the chief ways in which women's careers

155. *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 945 (Bye, J., dissenting).

156. See Recent Case, *supra* note 14, at 1452.

157. See *supra* notes 83–84 and accompanying text.

158. See *supra* notes 80–83 and accompanying text.

159. See *Allen v. Entergy Corp., Inc.*, 193 F.3d 1010, 1020 (8th Cir. 1999).

160. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–30 (1971) ("The objective of Congress in the enactment of Title VII . . . was to achieve equality of opportunity and remove barriers . . . [with respect to previously disfavored groups]."); see generally Alan Freeman, *Racism, Rights, and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295 (1988).

161. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."); Law, *supra* note 56, at 364–68 (1998) (describing the social and economic effects of unintended pregnancies).

have been impeded and women employees treated like second class employees.”¹⁶²

Nearly one-half of all pregnancies in the United States are unintended.¹⁶³ Financial barriers to accessing contraceptives mean that many women face difficulties in balancing their work and family roles.¹⁶⁴ Unplanned pregnancies, in addition, exacerbate traditional perceptions that women are less dedicated and reliable workers than their male counterparts.¹⁶⁵ In short, the equitable treatment of prescription contraceptives in employer-sponsored health plans will enhance the equitable treatment of women in the workplace.

D. Conclusion

Courts should embrace the reasoning of Judge Bye’s dissent in *Union Pacific* in addressing the issue of prescription contraceptive exclusions from employer-sponsored health plans. Given the predominant role that such plans play in underwriting the health risks of American women,¹⁶⁶ this step will have the salutary effect of enhancing access to prescription contraceptives and reducing the number of unintended pregnancies. But a second strategy is needed as well because Title VII’s reach is limited. Two limitations are particularly noteworthy. First, Title VII applies only to employers with fifteen or more employees.¹⁶⁷ Second, Title VII only regulates health plans that are directly provided by employers.¹⁶⁸ Since Title VII prohibits only discrimination by *employers*, it does not regulate health benefits that are purchased from an insurance company.¹⁶⁹

162. 123 CONG. REC. H10582 (daily ed. Apr. 5, 1977).

163. CTRS. FOR DISEASE CONTROL & PREVENTION, FERTILITY, FAMILY PLANNING AND REPRODUCTIVE HEALTH OF U.S. WOMEN: DATA FROM THE 2002 NATIONAL SURVEY OF FAMILY GROWTH 59 (2005); *see also* GUTTMACHER INST., NEXT STEPS FOR AMERICA’S FAMILY PLANNING PROGRAM: LEVERAGING THE POTENTIAL OF MEDICAID AND TITLE X IN AN EVOLVING HEALTH CARE SYSTEM 4 (2009) (noting that about half of U.S. pregnancies—more than three million per year—are unintended), <http://www.guttmacher.org/pubs/NextSteps.pdf>.

164. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 158 (1976) (Brennan, J., dissenting) (“ . . . [P]regnancy exclusions built into disability programs both financially burden women workers and act to break down the continuity of the employment relationship, thereby exacerbating women’s comparatively transient role in the labor force.”).

165. *See* Phillips, *supra* note 33, at 348.

166. *See supra* note 12 and accompanying text.

167. 42 U.S.C. § 2000e(b) (2006).

168. *See* Sharona Hoffman, *AIDS Caps, Contraceptive Coverage, and the Law: An Analysis of the Federal Anti-Discrimination Statutes’ Applicability to Health Insurance*, 23 CARDOZO L. REV. 1315, 1348 (2002).

169. *Id.*

As discussed in the next Part, statutorily-mandated benefit coverage offers an additional means of expanding coverage for prescription contraceptives.

III. MANDATED HEALTH BENEFIT LAWS

Mandated benefit laws are frequently discussed as health care reform tools, but they reflect a tension between keeping costs low versus spreading the risk of loss as widely as possible.¹⁷⁰ An additional concern is whether such mandates should be adopted at the state or federal level. Many states currently mandate coverage of prescription contraceptives.¹⁷¹ However, ERISA generally immunizes self-insured employers from these state mandates such that they apply only to benefit plans that are purchased from insurance companies.¹⁷² In terms of a federal alternative, as early as 1997,¹⁷³ and nearly every year since,¹⁷⁴ members of Congress have introduced amendments to ERISA that would require all group health plan providers and group health plan insurance issuers to cover prescription contraceptives if the plan provides coverage for other prescription medicines and devices.¹⁷⁵

In order to evaluate the effectiveness of mandated benefit coverage, Subpart A examines existing state laws requiring contraception coverage. Next, Subpart B considers the appropriateness of federally mandated health benefit laws and analyzes the most recently proposed contraceptive equity amendments to ERISA. Ultimately determining that federal benefit regulation is both appropriate and preferable, Subpart B concludes by advocating for comprehensive federal regulation to improve access to reproductive health care.

170. Amy B. Monahan, *Value-Based Mandated Health Benefits*, 80 U. COLO. L. REV. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1244674.

171. See Kuhn, *supra* note 4, at 356 (noting that over the past decade many state legislatures have taken action to mandate coverage of prescription contraception by employer-related health plans).

172. See 29 U.S.C. § 1144 (2006); *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 732 (1985); see also Bapat, *supra* note 12, at 954.

173. See S. 743, 105th Cong. (1997); S. 766, 105th Cong. (1997); H.R. 2174, 105th Cong. (1997).

174. See H.R. 463, 111th Cong. (2009); S. 21, 111th Cong. (2009); H.R. 2412, 110th Cong. (2007); S. 3068, 110th Cong. (2007); H.R. 4651, 109th Cong. (2005); S. 1214, 109th Cong. (2005); H.R. 2727, 108th Cong. (2003); S. 1396, 108th Cong. (2003); H.R. 1111, 107th Cong. (2001); S. 104, 107th Cong. (2001); H.R. 2120, 106th Cong. (1999); S. 1200, 106th Cong. (1999).

175. Kuhn, *supra* note 4, at 364 (describing proposed legislation).

A. State Statutes

At least twenty-three states currently mandate equal coverage of prescription contraceptives.¹⁷⁶ None of these laws, however, apply to employers who pay for health care claims with their own funds because self-funded plans are regulated by ERISA, which broadly preempts state law.¹⁷⁷ In contrast, ERISA's "insurance savings clause" authorizes states to regulate the business of insurance as an exception to ERISA's broad preemptive effect.¹⁷⁸ As a result, state mandates apply to employer plans that purchase insurance but not to plans that employers provide directly and fund out of their own assets.¹⁷⁹ The exclusion of self-funded plans from state regulation is quite significant since such plans account for fifty-four percent of all beneficiaries covered by employer-sponsored health plans.¹⁸⁰ Thus, although state mandated contraception coverage may provide relief for some working women, the limited scope of these state laws leaves many women without coverage.¹⁸¹

176. See ARIZ. REV. STAT. ANN. §§ 20-1057.08A(1), 20-1402L(1), 20-2329A(1) (2002 & Supp. 2008); ARK. CODE ANN. § 23-79-1103(a) (West Supp. 2009); CAL. INS. CODE § 10123.196 (West 2005); CONN. GEN. STAT. ANN. § 38a-530e (West 2007); DEL. CODE ANN. tit. 18, § 3559 (2006); GA. CODE ANN. § 33-24-59.6(c) (West 2005); HAW. REV. STAT. ANN. §§ 431:10A-116.6, 432:1-604.5 (LexisNexis 2004); 215 ILL. COMP. STAT. ANN. 5/356z.4 (West 2008); IOWA CODE ANN. § 514C.19 (West 2007); ME. REV. STAT. ANN. tit. 24, § 2332-J(1) (2000 & Supp. 2008); ME. REV. STAT. ANN. tit. 24-A §§ 2847-G(1), 4247(1) (2000 & Supp. 2008); MD. CODE ANN., INS. § 15-826 (West 2002); MASS. GEN. LAWS ANN. ch. 175, § 47W(a)-(b); ch. 176A § 8W(a)-(b); ch. 176B § 4W(a)-(b), ch. 176G, § 4O(a)-(b) (West 2007 & Supp. 2008); MO. ANN. STAT. § 376.1199(1)(4) (West 2002 & Supp. 2008); NEV. REV. STAT. ANN. §§ 689A.0415, 698A.0415, 689B.0376 (West 2000); N.H. REV. STAT. ANN. §§ 415:18-i, 420-A:17-c, 420-B:8-gg (2006); N.M. STAT. ANN. § 59A-22-42 (West 2003); N.Y. INS. LAW § 3221(f)(16) (McKinney 2006 & Supp. 2008); N.C. GEN. STAT. § 58-3-178 (West 2000 & Supp. 2007); R.I. GEN. LAWS §§ 27-20-43(a), 27-41-59(a) (2002); VT. STAT. ANN. tit. 8, § 4099c(a) (2001); WASH. ADMIN. CODE 284-43-822(2)(a) (2009); W. VA. CODE ANN. §§33-16E-4(a-b) (West Supp. 2008); see also Kuhn, *supra* note 4, at 356-57.

177. See 29 U.S.C. § 1144(a) (2006); *Metro. Life Ins. Co.*, 471 U.S. at 732; see also Bapat, *supra* note 12, at 954.

178. See 29 U.S.C. § 1144(b) (2006).

179. See *Metro. Life Ins. Co.*, 471 U.S. at 732.

180. See Amy B. Monahan, *Federalism, Federal Regulation, or Free Market? An Examination of Mandated Health Benefit Reform*, 2007 U. ILL. L. REV. 1361, 1373 (2007) [hereinafter Monahan, *Mandated Health Benefit Reform*].

181. See, e.g., Katie Ervin Carlson, Note, *A Study of the Effectiveness of Mandated State Contraceptive Coverage in Iowa and Missouri and the Case for a Federal Law*, 54 DRAKE L. REV. 509, 524-26 (noting that despite its state-mandated contraceptive coverage, Iowa has experienced an increase in

These state laws contain varying coverage requirements. For instance, some laws mandate coverage of “any” or “all” contraceptive drugs and devices approved by the Food and Drug Administration (FDA).¹⁸² Other laws mandate coverage of FDA-approved contraceptive drugs and devices but do not contain the words “any” or “all.”¹⁸³ Still another law merely prohibits the exclusion of FDA-approved contraceptives.¹⁸⁴ Most, but not all, state laws contain conscience clauses exempting coverage for religious employers or insurers.¹⁸⁵ These state mandate laws, accordingly, provide a regulatory regime that is far from uniform.

As a possible remedy to insufficient coverage, Congress could repeal the ERISA preemption provision, thereby granting states complete regulation of health care.¹⁸⁶ Exclusive state regulation of health insurance, however, would create enormous inefficiencies because multi-state employers would have to comply with up to fifty different sets of health plan regulations.¹⁸⁷ Positive federal regulation mandating benefit coverage for ERISA plans may be a more appropriate approach.¹⁸⁸

abortions, likely because most of the women obtaining abortions were not covered by plans subject to the state law).

182. See GA. CODE ANN. §33-24-59.6(c) (West 2005); ME. REV. STAT. ANN. tit. 24-A, § 2756 (2000 & Supp. 2008); MD. CODE ANN., INS. § 15-826, 829 (West 2002); MO. ANN. STAT. § 376.1199(1)(4) (West 2002 & Supp. 2008); N.H. REV. STAT. ANN. §415:18-i (2006); VT. STAT. ANN. tit. 8, § 4099c(a) (2001); see also Breena M. Roos, Note, *The Quest for Equality: Comprehensive Insurance Coverage of Prescription Contraceptives*, 82 B.U. L. REV. 1289, 1298–1301 (2002) (summarizing the available scope of coverage under various state laws).

183. See, e.g., DEL. CODE ANN. tit. 18, § 3559 (2001); MASS. GEN. LAWS ANN. ch. 176B, § 4W(b) (West 2007 & Supp. 2008); N.M. STAT. ANN. § 59A-22-42 (West 2003); N.C. GEN. STAT. § 58-3-178 (West 2000 & Supp. 2007); Roos, *supra* note 182, at 1299 n.95 (listing all laws that mandate coverage of FDA-approved contraceptives but lack the words “any” or “all”).

184. See CONN. GEN. STAT. § 38a-503e (2001).

185. See Roos, *supra* note 182, at 1301 (noting that fifteen states grant some form of religious exemption). For a detailed discussion about using religious conscience clauses in contraception equity legislation, see Staci D. Lowell, Note, *Striking a Balance: Finding a Place for Religious Conscience Clauses in Contraceptive Equity Legislation*, 52 CLEV. ST. L. REV. 441 (2005).

186. See Monahan, *Mandated Health Benefit Reform*, *supra* note 180, at 1375–76.

187. See *id.* at 1375; Stephen F. Befort & Christopher J. Kopka, *The Sounds of Silence: The Libertarian Ethos of ERISA Preemption*, 52 FLA. L. REV. 1, 39 (2000).

188. Cf. Monahan, *Mandated Health Benefit Reform*, *supra* note 180, at 1388–1401 (discussing the benefits and drawbacks of increasing substantive federal health care regulation generally, ultimately advocating that federal

B. Proposed Federal Amendments

For over ten years, versions of the proposed contraceptive equity legislation (EPICC) were stalled in Congress.¹⁸⁹ As recently as January 2009, the EPICC was again introduced to amend ERISA by prohibiting group health plans and health insurance issuers from excluding or restricting benefits for prescription contraceptives if such plans provide benefits for other prescription drugs.¹⁹⁰ Consideration of this bill is increasingly urgent after the Eighth Circuit's failure to use Title VII as a tool to remedy gender-based benefit disparities.¹⁹¹ An amendment to ERISA, of course, does not provide a universal solution to the matter of prescription contraceptives since it does not apply to individuals who are unemployed or otherwise not covered by a group health plan.¹⁹² But the EPICC would importantly fill many of the coverage gaps currently created by various state mandates and offer another potential remedy for eradicating sex discrimination in employee health plans. To evaluate the desirability of enacting the EPICC, this Subpart will first examine the appropriateness of amending ERISA in light of federalism concerns before then analyzing the substance and impact of the pending EPICC bill.

1. Federalism Concerns

States historically played a principal role in the regulation of health care and insurance.¹⁹³ The 1945 McCarran-Ferguson Act

regulation has significant advantages over the status quo and represents the best way forward for mandated benefit reform).

189. See H.R. 463, 111th Cong. § 201-04 (2009); S. 21, 111th Cong. § 201-04 (2009); H.R. 4651, 109th Cong. (2005); S. 1214, 109th Cong. (2005); H.R. 2727, 108th Cong. (2003); S. 1396, 108th Cong. (2003); H.R. 1111, 107th Cong. (2001); S. 104, 107th Cong. (2001); H.R. 2120, 106th Cong. (1999); S. 1200, 106th Cong. (1999); H.R. 2174, 105th Cong. (997); S. 766, 105th Cong. (1997); S. 743, 105th Cong. (1997).

190. See S. 21, 111th Cong. §§ 201-04 (2009); H.R. 463, 111th Cong. §§ 201-04 (2009).

191. See generally *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936 (8th Cir. 2007).

192. See Kuhn, *supra* note 4, at 367-72 (arguing that the EPICC amendments to ERISA would not help those in greatest need of prescription contraception, including poor, young, uninsured women).

193. See *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 756 (1985) (noting that the states "traditionally have had great latitude" to legislate as to the "protection of the lives, limbs, health, comfort, and quiet of all persons" (quoting *Slaughter-House Cases*, 83 U.S. 36, 62 (1873))).

provides explicit authority to the states to regulate the business of insurance.¹⁹⁴ Passed in response to a 1944 Supreme Court decision that recognized insurance as an element of interstate commerce,¹⁹⁵ the McCarran-Ferguson Act grants states broad powers to regulate insurance.¹⁹⁶ State authority remains subject to federal override, however, as Congress specifically reserved the right to supersede state law.¹⁹⁷ Congress retains the ability to regulate insurance so long as it explicitly states that the legislation is intended to apply to the business of insurance.¹⁹⁸

ERISA did not initially dictate the specific benefits that group health plans were required to provide but left such substantive regulation to the states.¹⁹⁹ Congress, however, has amended the Act in recent years to include limited substantive requirements for group health plans, similar to state mandated benefit laws.²⁰⁰ Examples of recent federal legislation include the Newborns' and Mothers' Health Protection Act of 1996²⁰¹ and the Mental Health Parity Act of 2006.²⁰² Indeed, the Supreme Court has noted that the federal government has played an "increasingly significant role in the protection of the health of our people."²⁰³

While many states have enacted mandated benefit laws requiring health insurance plans to include substantive coverage provisions,²⁰⁴ the competing standards that these state laws impose may create undesirable inefficiencies and result in reduced benefits for employees.²⁰⁵ To avoid the detrimental costs associated with diverse regulatory standards, many scholars debating possible

194. 15 U.S.C. §§ 1011–1015 (2006).

195. See *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 541–46, 553 (1944).

196. 15 U.S.C. § 1012(b) (2006).

197. *Id.*

198. *Id.* ("No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance . . ."). The McCarran-Ferguson Act likely would not bar the application of EPICC, if enacted, from overriding state insurance regulations. See Kuhn, *supra* note 4, at 366.

199. See Monahan, *Mandated Health Benefit Reform*, *supra* note 180, at 1371.

200. See *id.*

201. See 42 U.S.C. § 300gg-4 (2006).

202. See 29 U.S.C. § 1185 (2006).

203. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (referencing the federal statutes regulating food and drug safety).

204. See Monahan, *Mandated Health Benefit Reform*, *supra* note 180, at 1365.

205. See *id.* at 1389–91 (stating that ERISA preemption of self-insured plans coupled with jurisdictional competition among the states results in a multiplicity of benefit standards).

remedies for the nation's broken health care system advocate for regulation at the federal level as well as federal preemption of state regulation whenever Congress mandates substantive health provisions.²⁰⁶ Such an approach is consistent with the notion that ERISA was designed to provide a uniform regulatory scheme for employers by preempting state laws that "relate to" any employee benefit plan.²⁰⁷

A significant normative consideration also favors regulation at the federal level. As Amy Monahan has explained, "the outcomes of our current system of health insurance regulation turn on a morally arbitrary distinction—a distinction based solely on how a health plan is funded."²⁰⁸ Thus, state regulation may govern insured health plans while federal law preempts such regulation with respect to self-funded plans.²⁰⁹ Regulation by means of federal law can overcome this irrational distinction by bringing both plan types under the same regulatory umbrella.

2. *Proposed Contraceptive Equity Legislation 2009*

The proposed EPICC would provide a federal mandate for prescription contraceptive coverage in otherwise comprehensive health plans. More specifically, the language of the pending bill provides:

A group health plan, and a health insurance issuer providing health insurance coverage in connection with a group health plan, may not—

(1) exclude or restrict benefits for prescription contraceptive drugs or devices approved by the Food and Drug Administration, or generic equivalents approved as substitutable by the Food and Drug Administration, if such plan or coverage provides benefits for other outpatient prescription drugs or devices²¹⁰

206. See, e.g., *id.* at 1389 (premising arguments for federal regulation on the assumption that because of the undesirability of two possible levels of regulation, Congress would "specifically act to preempt states' authority to regulate the substance of health insurance contracts"); Hoffman, *supra* note 168, at 1362 (urging the adoption of a federally based national health benefits package).

207. See 29 U.S.C. § 1144(a) (2006) (noting that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan"); see also Befort & Kopka, *supra* note 187, at 35 (contending that ERISA preemption "was designed to create a uniform body of federal law regulating employee benefits").

208. Monahan, *Mandated Health Benefit Reform*, *supra* note 180, at 1397.

209. See *supra* notes 171–172 and accompanying text.

210. S. 21, 111th Cong. § 715(a)(1) (2009).

Significantly, this mandate would extend to both “a group health plan” and to “a health plan issuer,” thereby covering both self-insured and insured health care plans. The EPICC, accordingly, would create a uniform mandate and overcome the “irrational distinction” of treating these two plan types in an inconsistent fashion.

As currently drafted, the proposed EPICC would amend ERISA to set a federal floor of protections concerning prescription contraceptives while allowing states to set yet higher standards.²¹¹ In other words, the EPICC would not preempt more demanding state laws that may require more expansive benefit coverage for employees.²¹² This approach is similar to that of the Newborns and Mothers’ Health Protection Act, which does not preempt stricter state laws that provide at least the minimum coverage mandated by the federal Act.²¹³

Rather than saving stricter state laws from preemption and creating a patchwork of federal and state insurance regulations for contraceptive coverage, the EPICC should be altered to create a universal benefit mandate that preempts such state laws altogether, thereby avoiding a multiplicity of divergent contraceptive mandates.²¹⁴ Federal mandates offer a more efficient and effective means of achieving uniform and comprehensive coverage.²¹⁵ Although changing the preemption provision would eliminate the opportunity for state innovation that is protected in the current EPICC bill, offering a uniform standard will reduce compliance costs for health plans and therefore likely increase support for the bill.

Parties opposed to mandated contraceptive coverage are likely to argue that the EPICC legislation will have the perverse effect of encouraging employers to eliminate prescription drug plans altogether. Rather than assuming the additional cost of covering prescription contraceptives, employers may stop sponsoring health plans at all or reduce benefits broadly to avoid accusations of inequality.²¹⁶ In other words, federally mandated contraceptive coverage may create a “race to the bottom” in which employers craft equally exclusionary health plans.

211. See S. 21, 111th Cong. §§ 715(e), 2708(e) (2009).

212. See *id.*

213. See 42 U.S.C. § 300gg-4(f) (2006).

214. Lynda A. Rizzo, *The Equity in Prescription Insurance and Contraceptive Coverage Act: Will Congress Heed the Wake-Up Call of Erickson v. Bartell Drug Company?*, 9 CONN. INS. L.J. 253, 261–64 (criticizing state contraceptive mandates as ineffective).

215. See Monahan, *Mandated Health Benefit Reform*, *supra* note 180, at 1389.

216. See Hoffman, *supra* note 168, at 1359; Kuhn, *supra* note 4, at 366.

While the EPICC may create some additional expenses for existing comprehensive plans that currently exclude contraceptives from covered benefits, the price of covering birth control pills is minimal compared to the cost of childbirth. It is estimated that health plans save between \$9,000 and \$14,000 per woman when contraception is used to avoid an unintended pregnancy.²¹⁷ The financial costs of childbirth are much greater than the costs of even many years of prescription contraceptives.²¹⁸ Unintended pregnancies are more likely to involve increased health risks, and when a pregnancy results in a distressed newborn or causes injury to the mother, the medical costs are even greater than with healthy childbirth.²¹⁹ Accordingly, employers have a financial incentive to cover prescription birth control treatment for female employees.

On balance, the adoption of a federal law mandating the inclusion of prescription contraceptives in otherwise comprehensive group health plans serves positive policy objectives. Coupled with full preemption of state regulation, such legislation also would further efficiency and normative goals. Congress should quickly enact such a modified version of the EPICC proposal.

CONCLUSION

Unwanted pregnancies pose a public health concern because of increased medical risks for mothers and newborns.²²⁰ The United States has one of the highest rates of unintended pregnancies among industrialized nations.²²¹ Contraceptives are effective in preventing unintended pregnancy, and increased access to them importantly mitigates the adverse social consequences of unwanted pregnancies.²²² As a matter of policy, ensuring equal health care coverage also is an important step towards eliminating gender-based discrimination in the workplace.

217. See James Trussell et al., *The Economic Value of Contraception: A Comparison of 15 Methods*, 85 AM. J. PUB. HEALTH 494, 494–503 (1995).

218. See Law, *supra* note 56, at 366 (comparing the costs of specific prescription contraceptive options to the medical costs of childbirth). Employer-provided health plans are already required to cover the cost of childbirth. See Newborns' and Mothers' Health Protection Act of 1996, 42 U.S.C. § 300gg-4; Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2006); *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

219. See Law, *supra* note 56, at 366.

220. See S. 21, 111th Cong. § 2 (2009) (noting that each year, nearly half of all pregnancies in the U.S. are unintended, and nearly half of unintended pregnancies end in abortion).

221. *Id.*

222. *Id.*

A twofold approach to contraceptive equity regulation that couples a proper interpretation of Title VII with federal benefit mandates offers the most comprehensive solution for eliminating sex-based discrimination in employer health plans. Providing equal coverage of prescription contraceptives importantly reduces sex-based discrimination in the workplace—a significant public policy concern enshrined in Title VII and the PDA. Courts, accordingly, should draw from Judge Bye's *Union Pacific* dissent to invalidate the exclusion of prescription contraceptives from otherwise comprehensive health care plans. Meanwhile, Congress also should act swiftly to pass the EPICC with a revised preemption clause to create uniform standards requiring all comprehensive health plans to offer contraceptive coverage. In tandem, these steps will both remedy gender discrimination and diminish the adverse health, social, and economic consequences resulting from unintended pregnancies.